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No. 02-1196

In The

Supreme Court of the United States

THE SECURITIES AND EXCHANGE COMMISSION, PETITIONER,

v.

CHARLES E. EDWARDS, RESPONDENT.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF THE SECURITIES REGULATORS FOR THE STATES OF FLORIDA AND COLORADO AS *AMICI CURIAE* IN SUPPORT OF THE SECURITIES AND EXCHANGE COMMISSION

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QUESTIONS PRESENTED

1. Whether a return on an investment should be excluded from the meaning of "profits" under the *Howey* test for investment contracts merely because the promoter of the investment offers a fixed rate of return.

2. Whether a return on an investment, which is in fact wholly dependent upon the effort of others, should nevertheless be viewed as not "derived from the efforts of others" under *Howey* merely because the promoter contractually promises or guarantees the return.

INTERESTS OF THE AMICI CURIAE

The *Amici Curiae*, the State of Florida Department of Financial Services, Office of Financial Institutions and Securities Regulation and the State of Colorado Department of Regulatory Agencies Division of Securities ("*Amici Curiae*"), through undersigned counsel, are responsible for regulating the securities industry within their respective states.[1] As regulatory agencies overseeing the securities industry, the *Amici Curiae* are extremely concerned with the potentially devastating effect the Eleventh Circuit's decision in this case, i.e., holding that investments in ETS Payphones, Inc., do not qualify as securities, may have on the efforts of the various state securities regulators to protect the investing public.

STATEMENT

The *Amici Curiae* recognize the significant demands placed on this Court's time and resources and, out of respect for such, have opted to forego the filing of a lengthy detailed brief. Instead, the *Amici Curiae* wish to simply state that the level of their concern over the Eleventh Circuit's ruling has not diminished since the filing of their *Amici Curiae* brief in support of the Securities and Exchange Commission's Petition for

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[1]Pursuant to Sup. Ct. R. 37.6, the Amici Curiae represent that no counsel for any party authored this brief in whole or in part, and no person or entity, other than the Amici Curiae, made any monetary contribution to the preparation or submission of the brief. Pursuant to Sup. Ct. R. 37.3, the Amici Curiae represent that both parties to this appeal consented to the filing of this amicus brief. Copies of their written consents are being filed with this brief.

Certiorari. Indeed, if anything, their concern has been heightened by the number of requests received from previously disciplined entities and individuals requesting that the disciplinary decisions be reversed based on the Eleventh Circuit's ruling. Those requests, coupled with a number of cases in which the Eleventh Circuit's decision has been cited as a basis for not taking regulatory action at all, have given rise to concern over the *Amici Curiae*'s abilities to continue to effectively protect the investing public from fraudulent or questionable investment schemes.

The *Amici Curiae* hereby incorporate the arguments set forth in their *Amici Curiae* brief in support of the Securities and Exchange Commission's Petition for Certiorari as though said arguments were set forth in full herein. Additionally, the *Amici Curiae* support and adopt the arguments set forth in the North American Securities Administrators Association, Inc.'s ("NASAA") *amicus curiae* brief on the merits in this case.

CONCLUSION

For the reasons set forth above and discussed in depth in the briefs identified above, the *Amici Curiae* respectfully request that the Eleventh Circuit's decision be reversed.

Respectfully submitted.

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